

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 21, 2011 Session

DANIEL CLAY LEWIS v. DANA HOLDING CORPORATION

Appeal from the Chancery Court for Gibson County
No. H5491 George R. Ellis, Chancellor

No. W2010-01863-WC-R3-WC - Mailed May 6, 2011; Filed June 6, 2011

An employee sustained an injury to his shoulder at work. After a surgical repair, he briefly returned to work but was laid off prior to reaching maximum medical improvement. He filed a complaint in chancery court seeking workers' compensation benefits from his employer. His treating physician assigned no impairment rating and placed no restrictions on his activities. An evaluating physician assigned 6% impairment to the body as a whole and recommended that Mr. Lewis avoid certain activities. The trial court awarded 36% permanent partial disability to the body as a whole. The employer has appealed, contending that the award is excessive. We modify the judgment to award 24% permanent partial disability to the employee. We also conclude that local Rule 17A of the Chancery Court of the 28th Judicial District of Tennessee conflicts with Tennessee Rule of Civil Procedure 58.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Chancery Court Modified

JANICE M. HOLDER, J., delivered the opinion of the court, in which WALTER C. KURTZ, SR. J., and TONY A. CHILDRESS, SP. J., joined.

Fred J. Bissinger, Nashville, Tennessee, and Terri L. Bernal, Chattanooga, Tennessee, for the appellant, Dana Holding Corporation.

Floyd S. Flippin and Terri Smith Crider, Humboldt, Tennessee, for the appellee, Daniel Clay Lewis.

MEMORANDUM OPINION

Factual and Procedural Background

Dana Holding Corporation (“Dana”), a manufacturer of truck components, employed Daniel Clay Lewis (“Mr. Lewis”) as an assembly line worker beginning in 2003. On October 15, 2008, Mr. Lewis was using a torque gun to tighten a bolt when a weld broke causing the gun to violently pull and injure his shoulder.

After his injury, Mr. Lewis was initially referred to a primary care physician, who subsequently referred Mr. Lewis to Dr. Michael Cobb, an orthopaedic surgeon. Dr. Cobb diagnosed Mr. Lewis with a ligament Bankart lesion. A ligament Bankart lesion is a detachment of the labrum, a layer of fibrous tissue, from the glenoid, commonly referred to as the shoulder socket. Dr. Cobb performed a surgical procedure to reattach the labrum to the glenoid on January 9, 2009. After the surgery, Mr. Lewis briefly returned to work with restrictions on the use of his left arm. However, he was laid off on February 29, 2009. On September 10, 2009, Mr. Lewis filed a complaint in chancery court seeking workers’ compensation benefits from Dana. Dana does not dispute that the injury is compensable. The trial court held a hearing on March 31, 2010, to determine the percentage of permanent partial disability Mr. Lewis sustained as a result of his injury.

The trial court announced its findings from the bench. The trial court found that Mr. Lewis sustained a 36% permanent partial disability to the body as a whole. The award was six times the 6% impairment rating assigned by an evaluating physician, Dr. Samuel Chung, and therefore was the maximum award permitted by Tennessee Code Annotated section 50-6-241(d)(2)(A) (2008). The trial court entered its judgment on August 31, 2010, assigning 36% permanent partial disability to Mr. Lewis. Dana has appealed.

Analysis

A party that is dissatisfied with the judgment of a trial court in a workers’ compensation action may appeal to the Tennessee Supreme Court, which in turn may refer the matter to the Special Workers’ Compensation Appeals Panel for findings of fact and conclusions of law. Tenn. Code Ann. § 50-6-225(e)(1), (e)(3), (e)(5); Tenn. Sup. Ct. R. 51. The Special Workers’ Compensation Appeals Panel reviews the trial court’s findings of fact de novo on the record, and we presume that the trial court’s findings are correct “unless the preponderance of the evidence is otherwise.” Tenn. Code Ann. § 50-6-225(e)(2).

The events that transpired following the trial court’s ruling from the bench on March 31, 2010, are unfortunate and consumed an unnecessary amount of time on the part of both

the trial court and counsel for the parties. The genesis of the events concerns Local Rule 17A of the Chancery Court of the 28th Judicial District, which provides,

Unless the Court directs otherwise, attorneys for prevailing parties will prepare orders for entry by the Court. All orders must be received by the Clerk and Master within fourteen days on which [sic] the ruling is made by the Court, in compliance with Rule 58 of the Tennessee Rules of Civil Procedure. If the order is not filed within the time limit, an Order Dismissing the Case for Failure To Prosecute shall be entered.

28th Jud. Dist. of Tenn. R. of Ch. Ct. 17A.

In a May 14, 2010 order, the trial court dismissed Mr. Lewis's case "for failure to prosecute" when Mr. Lewis "failed to file the order within fourteen (14) days" of March 31, 2010, the date "on which the ruling was made by the Court." A number of motions, affidavits, and memoranda followed.¹ Mr. Lewis's counsel initially filed a motion to set aside the dismissal order and subsequently filed a motion to "alter the May 14, 2010 judgment dismissing the case" pursuant to Tennessee Rule of Civil Procedure 60.02(1), explaining that he was delayed in obtaining a transcript of the hearing prior to the entry of the judgment. Opposing counsel argued that the dismissal of the case was proper pursuant to the local rule. On July 7, 2010, the trial court entered an order in which it granted Mr. Lewis's motion and withdrew the May 14, 2010 order of dismissal, conditioned on the entry of an order on or before July 9, 2010.

While Mr. Lewis was attempting to avoid the dismissal of the case, the trial court had signed an order dated May 18, 2010, which was date-stamped as filed on July 20, 2010. The July 20, 2010 order entered judgment and awarded Mr. Lewis the benefits outlined in the trial court's March 31, 2010 ruling. The order was approved for entry by counsel for Mr. Lewis, signed by the chancellor, and included a certificate of service to counsel for Dana.

Dana moved the trial court to alter or amend the July 20, 2010 judgment because it included findings of fact that had not been proved at trial, notably findings that would have supported the six-times multiplier. The trial court subsequently declared the July 20, 2010 judgment "null and void" because it was signed on May 18, 2010, before the trial court withdrew the first order dismissing the case. The trial court entered another judgment on

¹ Between the May 14, 2010 order dismissing the case and the August 31, 2010 judgment, the parties filed a total of eleven motions, responses, and replies, many of which were accompanied by affidavits. Mr. Lewis was required to pay reasonable attorney's fees to counsel for Dana for its response in opposition to Mr. Lewis's motion to alter the May 14, 2010 dismissal order and for counsel's court appearance.

August 31, 2010, assigning Mr. Lewis 36% permanent partial disability to the body as a whole.

Local Rule 17A

Initially, we are constrained to comment on the trial court's dismissal of the case for failure to prosecute pursuant to Local Rule 17A. Rule 18(a) of the Tennessee Supreme Court Rules requires the judges in each judicial district to adopt written uniform local rules prescribing procedures for "setting cases for trial; obtaining continuances; disposition of pre-trial motions; settlement or plea bargaining deadlines for criminal cases; and preparation, submission and entry of orders and judgments." The local rules of a judicial district must be "consistent with the statutory law, the rules of the supreme court and the rules of criminal and civil procedure." Tenn. Code Ann. § 16-2-511 (2009); Tenn. Sup. Ct. R. 18; see Tigg v. Pirelli Tire Corp., 232 S.W.3d 28, 35 (Tenn. 2007) (stating "local trial courts are empowered to enact and enforce local rules as long as those rules do not conflict with general law").

Local rules are important to provide notice to attorneys, some of whom may reside outside the judicial district, of the local customs in each judicial district. With respect to the entry of orders, for example, some judicial districts may require orders to be submitted directly to the trial judge or to the trial judge's assistant; others may direct that orders be submitted to the clerk with whom the pleadings are filed. Such directives can assist attorneys in following the procedures that ensure that their cases are heard and resolved in a timely manner.

Local Rule 17A creates a rule of practice designed to facilitate Rule 58 of the Tennessee Rules of Civil Procedure, which governs the entry of judgment.² Rule 58 specifies the signatures and certification that are required for the proper entry of a judgment. Rule 58

² Tennessee Rule of Civil Procedure 58 provides,

Entry of a judgment or an order of final disposition is effective when a judgment containing one of the following is marked on the face by the clerk as filed for entry:

- (1) the signatures of the judge and all parties or counsel, or
- (2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or
- (3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.

Following entry of judgment the clerk shall make appropriate docket notations and shall copy the judgment on the minutes, but failure to do so will not affect validity of the entry of judgment. When requested by counsel or pro se parties, the clerk shall forthwith mail or deliver a copy of the entered judgment to all parties or counsel. If the clerk fails to forthwith mail or deliver, a party prejudiced by that failure may seek relief under Rule 60.

does not set forth a time limit for entry of the order. In the absence of such a directive, the order should be entered within a reasonable time. Cf. State v. Best, 614 S.W.2d 791, 794 (Tenn. 1981) (holding that the absence of a time limit for filing an extraordinary appeal pursuant to Tennessee Rule of Appellate Procedure 10 permitted courts to deny the appeal if not pursued in a “reasonable time”); Bell v. Todd, 206 S.W.3d 86, 91 (Tenn. Ct. App. 2005) (instructing trial courts that are waiving the Tennessee Rules of Civil Procedure’s time requirements for pro-se inmates to grant “litigants extensions of time subject to reasonable time restrictions”). The trial court may, of course, direct counsel to submit an order to the trial court within a specified time. If the order is not submitted as directed, the trial court is not without options. A trial court has broad discretion in managing its courtroom and docket. Cf. Henry v. Goins, 104 S.W.3d 475, 481 (Tenn. 2003); Hessmer v. Hessmer, 138 S.W.3d 901, 905 (Tenn. Ct. App. 2003). Among other options, the trial court may direct counsel to explain the reason for the delay. The trial court also may direct the opposing party to submit the order, or it may draft the order and serve it on both counsel. See, e.g., Tenn. R. Civ. P. 58. The result, however, should be one in which a case is finalized by an order adjudicating the rights of the parties on the merits of the case.

In contrast to Rule 58, Local Rule 17A creates a time limitation that provides no discretion to the trial court. The party required to submit an order must do so within fourteen days or the cause will be dismissed for failure to prosecute. Moreover, it is unclear that Rule 17A permits a dismissal without prejudice. See Tenn. R. Civ. P. 41.02(3) (“Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule 41 . . . operates as an adjudication upon the merits.”) In this case, however, the trial court ultimately withdrew the order dismissing the case.

We recognize the need for a trial court to enter final orders in a timely fashion and to promptly adjudicate the rights of the parties. Local Rule 17A mandates the dismissal of a fully adjudicated case, however, simply because a prevailing party failed to enter an order within fourteen days. By doing so, Local Rule 17A imposes an impediment to the final resolution of the rights of both parties by creating a time limitation that is inconsistent with Rule 58. See Tenn. Sup. Ct. R. 18(c) (“[A]ny local rule that is inconsistent with a statute or a procedural rule promulgated by the Supreme Court shall be invalid.”).

Moreover, the Tennessee Supreme Court has consistently stated that the purpose of the workers’ compensation law is to secure benefits for employees who fall within its coverage. Martin v. Lear Corp., 90 S.W.3d 626, 632 (Tenn. 2002); see Tenn. Code Ann. § 50-6-116 (2008) (“[T]his chapter is declared to be a remedial statute, which shall be given an equitable construction by the courts, to the end that the objects and purposes of this chapter may be realized and attained.”). It therefore is contrary to the purpose of the workers’ compensation law to dismiss an employee’s meritorious workers’ compensation

claim after a trial on the merits merely because the prevailing party failed to submit an order for entry by the court within fourteen days of the court's ruling.

Permanent Partial Disability

Despite the confusion concerning the entry of multiple orders, it is clear that Dana has appealed from the order entered on August 31, 2010. The parties agree that the 1.5 multiplier for employees who have been returned to employment following an injury does not apply because Mr. Lewis has been laid off since February 26, 2009. Tenn. Code Ann. § 50-6-241(d)(1)(A). At issue is the application of Tennessee Code Annotated section 50-6-241(d)(2)(B) and the trial court's award of six times the medical impairment rating of Dr. Chung pursuant to Tennessee Code Annotated section 50-6-241(d)(2)(A). Dana argues that the trial court failed to make specific findings in its August 31, 2010 judgment to support its award of permanent partial disability five or more times the anatomical impairment, as required by Tennessee Code Annotated section 50-6-241(d)(2)(B).

Tennessee Code Annotated section 50-6-241(d)(2)(B) states, "If the court awards a permanent partial disability percentage that equals or exceeds five (5) times the medical impairment rating, the court shall include specific findings of fact in the order that detail the reasons for awarding the maximum permanent partial disability." Tennessee Code Annotated section 50-6-241(d)(2)(A) states that a trial court determining the extent of an injured employee's permanent partial disability "shall consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition." See also Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625, 629 (Tenn. 1999); Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn.1990).

The August 31, 2010 judgment merely states that "the Plaintiff suffered an injury to his left shoulder on October 15, 2008, and that said injury occurred during the course and scope of his employment and was therefore compensable" The trial court found that the employee did not make a meaningful return to work "and therefore the 1.5 multiplier does not apply and that the Plaintiff suffered a 36% to the Body as a Whole Permanent Partial Disability" as a result of the injury. The order does not explicitly state that it adopts Dr. Chung's medical impairment rating, nor does the order make any additional findings of fact.

A "court speaks through its order, not through the transcript" of its hearing. In re E.N.R., 42 S.W.3d 26, 31 (Tenn. 2001). In the interest of justice, however, we will review the trial court's ruling from the bench to determine if specific findings of fact were included at that time. At the conclusion of the trial, the trial court stated that it found Mr. Lewis "to be a forthright, honest individual with an unusually good work ethic and a sense of

responsibility.” The trial court detailed some of the lay testimony and pertinent portions of the medical testimony from Drs. Cobb and Chung. It did not state which of the medical experts it found to be credible but apparently used Dr. Chung’s medical impairment rating in arriving at a permanent partial disability award for Mr. Lewis. The trial court then concluded that Mr. Lewis “sustained a thirty-six percent permanent partial disability to the body as a whole.” The trial court failed to include any specific findings of fact that assist us in determining if the award meets the requirements of Tennessee Code Annotated section 50-6-241(d)(2)(B).

In the absence of findings of fact, we review the record to determine where the preponderance of the evidence lies. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997). In this case, we must determine whether the judgment awarding the maximum multiplier pursuant to Tennessee Code Annotated section 50-6-241(d)(2)(B) is supported by the record.

The trial court heard the testimony of several lay witnesses and reviewed the depositions of two physicians. Dr. Cobb, Mr. Lewis’s treating physician, testified that Mr. Lewis had a microscopic anatomical change to his anatomy as a result of the repair to his detached labrum, likely as a result of scar tissue that may be present. He testified that Mr. Lewis reached maximum medical improvement on May 6, 2009, and assigned no impairment and placed no permanent restrictions on Mr. Lewis’s activities. Dr. Cobb did not use a goniometer to measure Mr. Lewis’s range of motion.

At the request of his attorney, Dr. Chung examined Mr. Lewis on June 30, 2009. Dr. Chung testified that he used a goniometer as required by the Sixth Edition of the American Medical Association Guidelines (“AMA Guides”) to measure Mr. Lewis’s loss of range of motion. He opined that Mr. Lewis retained a permanent impairment of 6% to the body as a whole. Dr. Chung described the lost range of motion caused by the injury and surgery to be “mild” and recommended that Mr. Lewis avoid “overhead work, working away from the body and work requiring repetitive flexion, extension, rotation of his left shoulder.”

Mr. Lewis testified at trial by video deposition.³ At the time of his deposition, Mr. Lewis was a twenty-five-year-old high school graduate who had worked at part-time jobs at a fast food restaurant and at a movie theater while in high school. Following graduation in 2003, Mr. Lewis worked at a sporting goods company and enrolled at Jackson State Community College for approximately two weeks. He left college to work for Dana, first on a temporary basis and then full-time beginning in November 2003. He became a member

³ Mr. Lewis testified by video deposition because he was scheduled for deployment to Iraq prior to trial.

of the Tennessee National Guard in 2005. Mr. Lewis was laid off by Dana due to a downturn in the economy on February 26, 2009.

Following his lay-off, Mr. Lewis obtained a temporary job with the National Guard as a supply technician in April 2009 and was called to active duty for service in Iraq in December 2009. Mr. Lewis completed physical training at Camp Shelby, Mississippi. This training included sit-ups, push-ups, and running. He had to perform a “low crawl,” which was crawling “with your face in the mud, not looking up,” and a “high crawl,” which involved carrying or dragging a field pack and weapons. In addition, he was required to carry another soldier on his back or shoulder to simulate moving a wounded comrade. He was able to perform all of these tasks. He held the rank of Sergeant in the National Guard and anticipated that he would be assigned to a “radio shop” during his tour of duty in Iraq.

Mr. Lewis testified that his shoulder injury did not prevent him from engaging in any activities but that certain activities, such as reaching, caused pain. He had some difficulty sleeping because his shoulder became painful when he rolled on his left side. The trial court determined that Mr. Lewis was forthright in his testimony that movements with his left arm are painful.

With respect to the physicians who testified by deposition, we are free to draw our own determinations as to the weight and credibility of the evidence. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004). We conclude that Dr. Chung’s testimony is entitled to more weight than that of Dr. Cobb. Dr. Chung testified that the surgery consisted of two separate procedures, the Bankart repair and the labral repair. Dr. Cobb testified in detail as to the extent of the surgery required. During surgery, Dr. Cobb “first débrided and roughened” the area in the shoulder “so as to stimulate healing.” Dr. Cobb next placed “tiny anchors” in the edge of the shoulder socket. He attached sutures to the anchors and threaded the sutures through the labrum to secure the labrum to the socket “to try to recreate the stability of the shoulder.” Although Dr. Cobb referred to the anatomical change as microscopic and due to scarring that may be present, Dr. Chung stated the surgery performed is not inconsistent with a finding of an impairment pursuant to the AMA Guides. See Tenn. Code Ann. § 50-6-204(d)(3)(B) (2008). Dr. Chung also stated that he measured Mr. Lewis’s range of motion three times using a goniometer after having Mr. Lewis perform exercises to loosen his shoulder. Dr. Chung’s procedures were consistent with the AMA Guides. We conclude therefore that the evidence preponderates against an impairment rating of 0% and in favor of a finding that Mr. Lewis suffered an impairment and restrictions on activity as a result of the injury and surgery as outlined by Dr. Chung.

Turning to the maximum award of six times the impairment rating, however, we are unable to glean from the record those factors that would permit the maximum award pursuant

to Tennessee Code Annotated section 50-6-241(d)(2)(B). Although Mr. Lewis was relatively young at the time of his injury and without much work experience, he held a position with the National Guard in which he received training that may be converted to college credits. Mr. Lewis testified that his shoulder hurt and interfered with his sleep but that he was able to “do anything . . . I want to.” Moreover, after recovering from his injury, Mr. Lewis successfully completed a rigorous physical training program in preparation for his deployment to Iraq. The record includes no testimony, however, concerning the local job opportunities available to Mr. Lewis or his capacity to work at types of employment available in his disabled condition.

Taking all of these factors into consideration, we conclude that the evidence preponderates against the trial court’s award of the maximum percentage of permanent partial disability. Based on our de novo review of the record, we conclude that the record in this case supports an award of four times the impairment rating of 6%, or 24% permanent partial disability to the body as a whole.

Conclusion

The judgment is modified to award Mr. Lewis 24% permanent partial disability to the body as a whole. We also conclude that local Rule 17A of the Chancery Court of the 28th Judicial District of Tennessee conflicts with Tennessee Rule of Civil Procedure 58. Costs are taxed one-half to the appellee, Daniel Clay Lewis, and one-half to appellant, Dana Holding Corporation, and its surety, for which execution may issue if necessary.

JANICE M. HOLDER, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
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**Chancery Court for Gibson County
No. H5491**

No. W2010-01863-WC-R3-WC - Filed June 6, 2011

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed one-half to the Appellee, Daniel Clay Lewis, and one-half to the Appellant, Dana Holding Corporation, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM